In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-17, 78-249

UNITED GAS PIPE LINE COMPANY and THE FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,

VERSUS

BILLY J. McCOMBS, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL., IN OPPOSITION

STANLEY L. CUNNINGHAM
PHILIP D. HART
TERRY R. BARRETT
McAFEE, TAFT, MARK, BOND, RUCKS & WOODRUFF A Professional Corporation
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102
Attorneys for Respondents

of Counsel:
EUGENE KUNTZ
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102

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UTTERBACK TYPESETTING CO., 819 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITIES CONTINUED PAGE

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Respondents, Billy J. McCombs, R. J. Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corp. and Bill Forney ("McCombs") in this brief oppose petitions for writs of certiorari which have been filed by United Gas Pipe Line Company ("United") and the Federal Energy Regulatory Commission ("Commission") for a review of the decision of the United States Court of Appeals for the Tenth Circuit.

I.
QUESTION PRESENTED

The question is *not* one of primary jurisdiction of the Commission to determine abandonment of service under Section 7(b) of the Natural Gas Act (as contended by United) and is *not* whether a court of appeals may independently determine that service has been abandoned (as contended by the Commission). This action originated in a proceeding before the Commission, and was fully and finally disposed of by the Commission.

The only question is whether or not the court of appeals properly held that the Commission erred in failing retroactively to apply the Act to reflect compliance therewith where there had been a good faith failure to file abandonment papers by McCombs' predecessor, where McCombs was innocent of that failure, and where abandonment would have been routinely granted had the proper papers been filed at the proper time.

II.
STATEMENT OF THE CASE

A. Introduction.

"A most recent interesting case, unique in its facts and therefore of limited applicability, is *McCombs* v. *FPC*." Conine and Niebrugge, *Dedication Under the Natural Gas Act: Extent and Escape*, 30 Okla. L. Rev. 735, 795 (1977).

"The evidence relied upon by the court in the *McCombs* case was highly unusual and was based on a particular set of facts that may not exist in other situations." Producer Subcommittee of Natural Gas Committee, *Report*, 10 Nat. Res. Law. 129, 130 (1977).

The following statement is submitted inasmuch as both the Commission's and United's statement of the case omit certain facts deemed relevant by McCombs.

B. Proceedings Below.

On October 9, 1973, United filed a complaint in this matter with the Commission, alleging that McCombs is required to deliver production from a certain oil and gas lease, located in Karnes County, Texas (the "Butler B Lease") to United under Section 7 of the Natural Gas Act, 15 U.S.C. Sec. 717, *et seq.* (1976). Hearings were held before the Commission on January 10, and February 13 and 14, 1974. The Administrative Law Judge issued his initial

decision on April 26, 1974, finding that "however innocent" McCombs may have been and "however negligent United may have been in asserting its rights," McCombs was required to cease delivering gas from the Butler B Lease to E. I. du Pont de Nemours & Company ('du Pont") in intrastate commerce, and to commence delivering that gas to United in interstate commerce. The Judge refused McCombs' request to authorize abandonment as of 1966, as if the proper papers had been filed then, which refusal was duly put before the Commission on exceptions. (Separate Appendix to United's Brief, pp. 15, 21.)

On August 20, 1975, the Commission issued Opinion No. 740, holding, *inter alia*,

> "Whatever action the Commission may have taken under [Section 7(b)] from the time production ceased in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted." (Separate Appendix to United's Brief, p. 31.)

On judicial review, the court below held that the Commission erred in this respect.

> "In the light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act." (Commission Appendix, pp. 9a, 10a.)

C. The Butler B Lease and the 1953 Contract.

In 1948, B. C. Butler, Sr., *et al.*, Lessors, executed the Butler B Lease in favor of W. R. Quin, Lessee, covering 163 acres of land in Karnes County, Texas. In 1953, Mr. Quin's widow, Bee Quin, entered into a gas purchase contract (the "1953 Contract") with United covering the sale of gas well gas from the Butler B Lease. In 1954, the Commission granted certificates of public convenience and necessity to Bee Quin. The Butler B Lease was thereafter transferred several times, and in March of 1966 came to rest in the hands of Louis H. Haring, *et al.* ("Haring").

At the time of that acquisition, there was one well located on the Butler B Lease, but it was not producing. Haring unsuccessfully attempted to establish production from this well, during which a small amount of gas was obtained. All production from this well ceased on May 28, 1966.

United and Haring exchanged correspondence reflecting that there would be no more gas available. United then removed its measuring equipment, and Haring testified that he considered the 1953 Contract to be at an end. Although the term of the Butler B Lease was only for so long as production therefrom continued, the lease did not terminate because Haring drilled an oil well on the Butler B Lease, the production from which perpetuated the lease.

Haring, a petroleum geologist, testified, "Certainly I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, so far as I know, neither United nor anyone else was aware of its existence."

By letters dated August 8, 1968, and January 13, 1971, the Commission invited Haring to file an abandonment application and a notice of cancellation of the rate schedule. Because production had ceased, and because he was unaware of other production and he considered the 1953 Contract to have been ended, Haring testified that he and his counsel thought it unnecessary to file these papers. Until the hearing in this proceeding, McCombs did not know that Haring had not obtained abandonment permission.

D. McCombs.

There were no further developments concerning the Butler B Lease until 1970 or 1971, when Bill Forney, operator for McCombs, became interested in the possibility of deeper reserves in the area. Forney entered into a contract with Haring providing that Haring would assign Forney certain deep levels of the Butler B Lease in exchange for the drilling of a well.

Mr. Forney obtained from Haring a title opinion dated March 6, 1967 covering the Butler B Lease. This title opinion makes no reference to the 1953 Contract.

Mr. Forney commenced the drilling of the Butler No. 1 Well on August 27, 1971. He testified that at this time, in reliance on the 1967 title opinion, he believed his title to be clear. This well was completed as a producer of gas from two deep zones and earned an assignment from Haring of certain deep levels of the Butler B Lease.

After the completion of the Butler No. 1 well, McCombs began to contact purchasers concerning the gas. United was the first purchaser contacted. Although other

purchasers were also contacted, negotiations did not proceed to any great extent with them. United made four written offers for a contract, the first in November of 1971, and did not claim any rights under the 1953 Contract or the Natural Gas Act. United's best offer was 35¢ per Mcf for the first fourteen months, and a lower rate thereafter. As this was not satisfactory, negotiations were broken off with United, and the producers sought another market.

McCombs then entered into negotiations with du Pont resulting in a letter agreement dated April 12, 1972 with Lo Vaca Gas Gathering Company under which temporary deliveries were commenced on May 12, 1972, and culminating in a contract dated June 1, 1972, with du Pont. The contract provided for the same initial rate as United's offer, but with more satisfactory escalation provisions. Prior to April 12, 1972, United was aware that McCombs intended to sell the gas to an intrastate purchaser.

E. United Asserts Its Claim.

On June 6, 1973, more than one year after deliveries had commenced to du Pont, and more than a year and a half after United first offered to purchase the gas, United first claimed the right to purchase McCombs' gas from the Butler B Lease under the 1953 Contract. On August 2, 1973, McCombs filed suit for declaratory judgment that the 1953 Contract was void, and for other relief. United counterclaimed for damages. That case is styled *Billy J. McCombs, et al.* v. *United Gas Pipe Line Company, et al.*, No. SA-73-CA-210 in the United States District Court for the Western District of Texas at Austin (the "Austin Liti-

gation"). Although discovery and pre-trial procedures in that case have been substantially completed, the case is presently being held in abeyance pursuant to the agreement of counsel, pending completion of the instant litigation.

III.
REASONS FOR DENYING THE WRIT

A. The Court Below Did Not Exceed Its Authority, Nor Have the Commission's Processes Been Bypassed.

1. *Introduction.* This case deals with the consequences of a good faith failure of the proper party to file the proper papers with the Commission at the proper time. The courts have addressed similar situations arising from the Commission in three cases. In *Plaquemines Oil and Gas Company* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971) and *Highland Resources Inc.* v. *FPC*, 537 F.2d 1336 (5th Cir. 1976), the party had failed in good faith to file and the court required a retroactive application of the Act, as if the party had *complied* at the time required. In *Niagara Mohawk Power Corporation* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), and similar cases, the Commission itself retroactively applied the Act as if the party had complied at the time required.

In the instant case, the Commission was similarly asked to apply the Act retroactively as of 1966. In the light of the evidence existing at that time, the court below found that the Commission's failure to do so was erroneous.

The court held that the Commission had erred *as a matter of law* — not as to a matter of a fact. That is, the

error committed was not as to a factual issue within the expertise of the Commission. Instead, the Commission's error consisted of considering the wrong evidence in refusing to retroactively apply the Act. The Commission disregarded the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed, and applied the evidence as it existed in 1975, when it issued its Opinion. The *only* evidence concerning the facts existing in 1966 was the testimony of Haring, a petroleum geologist, that he had failed after diligent efforts to restore production, and that neither he nor United nor anyone else knew of any other reserves. Since the Commission could have reached but one conclusion based on this evidence, the court deemed it unnecessary to remand to the Commission to enter an order accordingly.

The court's holding is also within its equitable powers, for it fails to impose the devastating consequences of Haring's omissions on an innocent third party, McCombs.

2. *Haring's Actions Were in Good Faith.* When Haring acquired the Butler B Lease in 1966, the one gas well located on the lease was not producing. He expended considerable efforts in attempting to re-establish production but his efforts ended in failure. He testified that he first installed a compressor at a cost of $12,000, and the well produced for approximately ten days and then was overcome by salt water. He then brought in a workover rig and attempted workover operations for approximately two months during which small amounts of gas were produced. All production ceased on May 28, 1966. Haring was a petroleum geologist, and testified that neither he nor United,

nor anyone else knew of any further production. Since he believed that there was no more gas to deliver, and since United had removed its equipment, he testified that he considered the 1953 Contract at an end. When he received the Commission's letters inviting him to file an abandonment application, he consulted with his lawyer. Neither Haring nor his counsel thought it necessary to file abandonment papers with the Commission under these circumstances.

Their conclusions appear justified in the light of the existing judicial statements. In *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962), the Court had said,

> ". . . the duty to continue to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve*, or until the Commission, on appropriate terms, permits cessation of service under Sec. 7(b) . . ." (emphasis added)

And in *Harper Oil Company* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960), the Court had said:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder *so long as production continues.*" (emphasis added)

Indeed, as recently as April 17, 1978, in oral argument before this Court in the case of *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (U.S. May 31, 1978), the Commission adhered to those statements:

> "The Commission's position here is that this gas is dedicated *until the reserve is exhausted*, that in the

> words of the *Hunt* case the duty to continue to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve.*" (emphasis added) Transcript, p. 11.

Haring justifiably could not believe that he would be required to continue service after no more gas could be produced from his well.

United, like Haring, did not think it necessary to file abandonment papers with the Commission when it removed its facilities, although Section 7(b) of the Act is equally binding on it. *United Gas Pipe Line Company* v. *FPC*, 385 U.S. 83 (1966). Similar to Haring, United's witness testified that ". . . we don't feel that's necessary."

In the light of the facts as they were known then, the filing could only have been for the purpose of the Commission's records, for the Commission could have taken no action in denying abandonment which was inconsistent with the facts. Further, the Commission, until the issuance of its opinion in the instant case, had done nothing to dispel the courts' statements in the *Hunt* and *Harper* cases, and according to the oral argument in *Southland*, continues to adhere to them today.

Haring's actions must be said to be justified, reasonable, and in good faith.

3. *Abandonment Permission Would Have Been Routinely Granted in 1966.* The Commission handles nearly all producer abandonment applications in routine fashion, merely acting on the papers without a formal evidentiary hearing. In 1966, the Commission disposed of 154 producer

abandonment applications. Of these 154, only one was set for formal hearing and it was granted. *Charles L. Reed, et al.*, 35 FPC 954 (1966). The remaining 153 were disposed of without formal hearing, with 151 being granted. *See Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period January 1, 1966 through June 30, 1966, 35 FPC 1201-1203 (1966); *Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period July 1, 1966 through December 31, 1966, 36 FPC 1216-1221 (1966).

In light of the facts as Haring knew them in 1966, there is no doubt that the Commission would have granted him abandonment permission and probably would have done so in a routine fashion, as indicated above.

B. The Commission's Powers in the Administration of the Natural Gas Act Will Not Be Eroded by the Decision Below.

The decision below merely requires the retroactive application of the Act in a proper case, which is something the Commission has been doing since sometime prior to 1944. *See Metropolitan Edison Company*, 6 FPC 189 (1947). *See also* the *Androscoggin* case, *Public Service Company of New Hampshire*, 27 FPC 830 (1962); *Niagara Mohawk, supra* at 156, *et seq.*

The Commission's Opinion was issued in 1975, and no similar producer cases have arisen under Section 7(b) before or since. Nor does it appear likely that any will arise, because of the unusual facts of this case. Haring believed, in good faith, that the filing was unnecessary, as

opposed to merely being ignorant of the law. The Butler B Lease did not terminate with the cessation of production, as would ordinarily occur, but was perpetuated by some oil production. McCombs was unaware of Haring's omissions, or of the existence of the 1953 Contract. McCombs entered into its contract with du Pont without notice that United was claiming rights under the 1953 Contract or Section 7(b) of the Act. In fact, United had negotiated with McCombs for this very gas, and was aware that McCombs intended to sell the gas to another purchaser, prior to the time the du Pont contract was entered into. Had United notified McCombs before its gas was irrevocably committed to another purchaser, McCombs would have had an opportunity to prevent this case from arising. These circumstances are indeed unique and are not likely to be repeated. Nor is the view that this case is unique, and hence not deserving of this Court's consideration, simply a view held by McCombs' advocates in this proceeding. Scholarly comment is in accord, as indicated by the quoted material on page 3 above. The fact is that this case presents no issue of public law significance so as to justify the granting of the writs of certiorari.

C. Neither the Interstate Market Nor United Will Suffer as a Result of the Decision Below.

The amount of gas in this proceeding is exceedingly small in relation to United's requirements. In response to a motion filed on April 12, 1976, in the court below, McCombs showed that the remaining gas attributable to the Butler B Lease was less than two days supply for United's system.

Although the amount of gas is small, the decision below will permit the Austin Litigation to go forward, and United will have an opportunity to make itself and its customers whole in that forum.

D. There Is No Conflict Among the Circuits.

United, but not the Commission, attempts to raise a conflict with *Mitchell Energy Corp.* v. *FPC*, 533 F.2d 258 (5th Cir. 1956). This contention was properly dismissed by the court below for the reason that, in *Mitchell*, in addition to other factual differences, there had been no cessation of production and certainly no depletion of known reserves.

IV.
CONCLUSION

The decision below was a proper reversal of the Commission's failure to apply the Act retroactively as if Haring had complied therewith. The case is highly unusual, and is not important to the Commission's administration of the Natural Gas Act. It is therefore submitted that there are no special or important reasons for granting the petitions for writs of certiorari filed by United and the Commission, and that they accordingly should be denied.

Respectfully submitted,

STANLEY L. CUNNINGHAM
PHILIP D. HART
TERRY R. BARRETT
McAFEE, TAFT, MARK, BOND, RUCKS & WOODRUFF A Professional Corporation
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102

Attorneys for Respondents

of Counsel:

EUGENE KUNTZ
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102

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